Supreme Court, U. S.
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In the

Supreme Court of the United States

No. 79-1271

ROBERT O. POLLEY,

Petitioner,

vs.

WILBURN E. KIRKLAND, W. C. LONG, COY L. EMERT, GERALD PETTY, DONALD W. HUDSON, GARRY HARRIS and CONRAD ROBINSON, Individually and as Members of the Board of Trustees of the La Vega Independent School District, ROBERT W. CASTER, Individually and as Superintendent of the La Vega Independent School District, M. L. BROCKETTE, Individually and as Commissioner of the Board of Education of the State of Texas and THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS,

Respondents,

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

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Respondents,

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

This is the brief filed on behalf of the Respondents Wilburn E. Kirkland, W. C. Long, Coy L. Emert, Gerald Petty, Donald W. Hudson, Garry Harris and Conrad Robinson, individually and as members of the Board of Trustees of the La Vega Independent School District, Robert W. Caster, individually and as Superintendent of the La Vega Independent School District, said brief being in opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley.

OPINION

The memorandum opinion of the United States District Court, Western District of Texas, Austin Division, and the local Rule 21 decision of the United States Court of Appeals for the Fifth Circuit, appears in the appendix to Petitioner's Application for Writ of Certiorari, pages A1-A22.

JURISDICTION

Respondents herein have no objection to the ground upon which the jurisdiction of this Court is invoked as same is alleged in the Petitioner's Application for Writ of Certiorari (pp 3-4).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional Provisions and the Statutes involved are fully set forth in Petitioner's Brief (p 5).

QUESTIONS PRESENTED

1. Whether the District Court erred in granting the Motion for Summary Judgment for Respondents herein based on substantial evidence in the administrative hearings from which appeal was made.

2. Whether the majority ruling by this Court in the case of Bishop v. Wood, 426 U.S. 341 (1976), should be overturned or limited.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct and will not be repeated here; however, in support of the Respondents' position it is necessary that some omitted facts be brought to the attention of the Court. For purposes

of clarity it is pointed out at this juncture that the record in this case consists of two transcripts, the first transcript being that taken before the Board of Trustees of the La Vega Independent School District and the second being that taken before the State Commissioner of Education. References to the transcript of the hearing before the Board of Trustees of the La Vega Independent School District will be designated "Board TR." followed by the page number in the original transcript, with exhibits referred to as "Board TR.-Polley Ex." or "Board TR.-School Ex." followed by the number of the particular exhibit in question. References to the transcript or the hearing before the State Commissioner of Education will be designated "Comm. Ed. TR." followed by the page number in the original transcript with exhibits referred to as "Comm. Ed. TR.-Polley Ex." or "Comm. Ed. TR.-School Ex." followed by the number of the particular exhibit in question. All of these references will be preceded by the letter R. in order to designate a reference to the record. All references to the Petitioner's appendix, which is included in the Petitioner's Application for Writ of Certiorari will be referred to as "Pet. Ap." followed by the number of the particular page or pages to which reference is made. It is further pointed out in this regard that the transcript of both hearings referred to above were before the district court as stipulated by the parties for the reason that in order to shorten the hearing before the Commissioner of Education, the statement of facts and exhibits of the Board of Trustees herein were introduced in toto and accepted in evidence by agreement of the parties at the hearing before the Commissioner of Education. (R. Comm. Ed. TR. pp 10-11)

Prior to Petitioner's reassignment, which is made the basis of this suit, the Petitioner had served in the capacity

of principal of East La Vega Elementary School for three years. This reassignment became effective upon the expiration date of a two year contract which began on August 1, 1973, and terminated at the end of June, 1975. (R. Board TR.-School Ex. 3 and R. Comm. Ed. TR. p 78) The Petitioner was not reassigned nor was he demoted during the contract period nor was he dismissed during the contract period or at the end of the contract period. The Petitioner was offered a new one-year contract as a classroom teacher (R. Board TR. pp 11-12) which he accepted (R. Comm. Ed. TR. p 80). At the time that the Petitioner learned that the reassignment referred to above was to a position of a classroom teacher rather than that of principal, he did, in fact, demand a hearing before the Board of Trustees of the La Vega Independent School District to determine why he was being reassigned and was not being reelected to the position of principal. The Board of Trustees granted the hearing and after a full hearing the Board voted to affirm the decision not to give a contract to the Petitioner as a principal but to give him a contract as a classroom teacher. Prior to the hearing referred to above the Petitioner was informed explicitly of the various allegations against him and of the charges that would be presented at his hearing. (R. Board TR.-School Ex. 5) (Pet. Brief pp 10-11) (Pet. Appendix p A16) At the hearing referred to above the Superintendent of the La Vega Independent School District, Robert W. Caster, one of the Respondents herein, testified in length as to his recommendation to the Board of Trustees for the district that the Petitioner not be re-elected as principal for the East La Vega Elementary School for the school year 1975-76, and in so doing explicitly stated his reasons for his recommendation in the change of assignment and fully explained why, in his opinion, he did not believe the Petitioner was performing his job as principal in an effective

and efficient manner. There were many areas in which his dissatisfaction with the performance of the duties required of the Petitioner were explained (R. Board TR. pp 13-40). Other testimony offered at the hearing consists of the testimony of Mr. O. P. Adams, the Assistant Superintendent of the District. Mr. Adams also stated that he concurred with the decision to reassign the Petitioner from principal to classroom teacher as being in the best interest of the school system. (R. Board TR. pp 98-99) He further testified that he wrote the letter of January 20, 1975, (R. Board TR.-school ex. 6) and the reasons for writing the same (R. Board TR. pp 90-93). In view of this testimony, this writer cannot concur with the conclusion reached by the District Court in the Court's memorandum opinion of December 13, 1977, excerpts of which are printed on page 12 of Petitioner's Brief and which is also printed in the appendix to Petitioner's Brief beginning with the second paragraph on page A18 and continuing through the entire first paragraph on page A19. Respondents specifically disagree with that portion of the memorandum opinion set out above wherein it is stated that it would "appear to a reasonable reader that the letter was manufactured after the fact . . ." which "cast doubt on the credibility of the entire proceedings." Obviously, the writer of the opinion has not met or come in contact with anyone who habitually refers to himself in the third person. There are very few who do so but there are some people who do. Even though the District Court was critical, it recognized the law that it could not substitute its findings for those of the administrative agency and that there was substantial evidence in the record to support the decision of the agency. The District Court had before it the issue as to whether or not the Petitioner herein had received procedural due process. In attempting

to resolve this problem the Court pointed out in its opinion that:

> "The Commissioner of Education found, and the record adequately supports the finding, that the La Vega Independent School District had not adopted the statutory 'continuing contract' method of tenure which would have entitled Polley to procedural protections set forth in Chapter 13, sub-chapter C, of the Texas Education Code (1972)." (A-Pet. App. p A9)

The Court, after having set out the above, went on to say that due to the letter that had been received by the Petitioner that this did, in fact, create a non-subjective expectancy of continued employment and would therefore entitle the Petitioner herein to procedural due process, however, in making this observation the Court further observed and pointed out that the Petitioner herein did not, at the time of said hearing nor had he ever contended that he had been denied procedural due process as required by law, and more particularly by the 14th Amendment to the Constitution of the United States. The Court, in making this finding, set out the following:

> "Plaintiff does not now contend that he was denied procedural due process though he points out that the Board had already voted to uphold the Superintendent's decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first incident subsequent to discharge." (A-Pet. App. p A14)

The Court, after having dealt with the procedural due process question then approached the question of whether or not there was substantial evidence to support the ad-

ministrative determination that had been previously made by both the Board of Trustees of the La Vega Independent School District and by the Commission of Education and the State Board of Education. In so doing the Court pointed out in its opinion that the case had been submitted by both parties under the agreement that the substantial evidence rule did, in fact, apply. In arriving at the determination that there was, in fact, substantial evidence to justify the decision of the administrative agencies as set out above, the Court wrote the following:

> "In determining whether there is in the records substantial evidence to support an administrative determination, this Court may not substitute its judgment for that of the agency. Evidence which is substantial need be only enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from the evidence is one of fact for the jury. Watson v. Gulf Stevedore Corp., 400 F. 2d 649 (5th Cir. 1968). Under that narrow standard and after a thorough review of the entire transcript, the Court is of the opinion that there was substantial evidence to support the Board of Trustee's decision to demote Robert Polley." (A-Pet. App. pp A14-A15)

The Court, after having made the above statement, went on to discuss various items of evidence that had been adduced at both the hearing before the Board of Trustees and at the hearing before the Commissioner of Education, and after having discussed these items concluded its opinion as follows:

> "Nonetheless, viewing of the transcript as a whole, the Court cannot conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action completely arbitrary. Even though as an original matter the Court

might view the evidence differently, considerable deferance and leeway must be given to the local officials in making personnel decisions." (A-Pet. App. pp A-19-A20)

The Court went on to quote verbatim from the decision handed down by the United States Supreme Court in Bishop v. Wood, 426 U.S. 341 (1976), wherein the Supreme Court set out the following:

> "We must accept the hard fact that numerous individual mistakes are inevitable in the da to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must premuse that official action was regular and, if erroneous, can best be corrected in other ways." (A-Pet. App. p A20)

ARGUMENT

The Federal District Court's ruling of December 13, 1977, and the ruling of the United States Court of Appeals for the Fifth Circuit handed down on December 6, 1979, are correct and should be affirmed by this Court. The premise set forth in the brief of the Petitioner is that this Court should overturn the majority opinion of the United States Supreme Court handed down in *Bishop v. Wood*, 426 U.S. 341 (1976), however, this writer would point out at this juncture that there is much more involved than just *Bishop v. Wood*, supra, and to consider the case at bar only in light of *Bishop v. Wood*, supra, would be somewhat misleading. Several well established principals of law and a long line of opinions would have to be totally disregarded in order to accomplish the end result which Petitioner is seeking.

First, the Petitioner alludes in his brief to due process. It is the Respondents' contention, which is adequately supported by both the transcripts of the prior hearings and the opinion handed down by the District Court and the United States Court of Appeals for the Fifth Circuit, that the due process guarantees of the 14th Amendment and the Federal Law as well as the State Law were met to their fullest.

In this regard it is pointed out that at the April meeting of the school board, when the Petitioner appeared and requested at that public meeting that the charges and accusations against him be made public, he did not have an attorney with him nor was he at that time represented by an attorney. (R-Board TR. p 81) In view of these facts the Superintendent and the Board, upon the advice of their counsel, refused to go into a hearing process with the Petitioner at that time. (R-Board TR. p 42) This was in keeping with the decision handed down by the Supreme Court in the case of *Board of Regents v. Roth*, 408 U.S. 546, S. Ct. 2701, and also in keeping with the Supreme Court's decision in *Perry v. Sindermann*, 1972, 408 U.S. 593, 92 S. Ct. 2694, and also in view of the decision of the Court of Civil Appeals for the State of Texas in the case of *Hix v. Tuloso-Midway Independent School District*, 489 S.W. 2d 706 1973, wherein the Court in all three cases mentioned above established the general principal that if a person is going to be reassigned, demoted, dismissed, or has his contract period altered in any way, that even though under the existing laws of the state or of the federal government that he may not be entitled to a hearing by virtue of said law, but that, if accusations, allegations, or any statements are made to him that would in any way damage his reputation or character in the community or tend to impose a stigma upon his personality that would foreclose or hinder him from seeking or obtaining other gainful employment that that person

would be automatically entitled to a hearing to refute any accusation, claim, or charge that would tend to discredit him in any manner as set out above. Shortly after this April meeting mentioned above the Petitioner herein did retain an attorney to represent him in this action. The attorney, in accordance with the laws of the state, contacted the Superintendent of Schools and this attorney in writing and requested a hearing for and on behalf of Petitioner. That even though the Board of Trustees was of the opinion that Petitioner herein was not entitled to a hearing, they did grant him this right in order to insure that he be given every right guaranteed him by the Constitution of the United States. That, shortly thereafter, a letter was sent to the Petitioner and his attorney setting forth in detail all charges and accusations against him and setting a definite time, date and place for a public hearing. In accordance with the terms and conditions of the prescribed guidelines for the hearing, a hearing was held in the administrative building of the La Vega Independent School District and at said hearing Mr. Polley was represented by an attorney and had every procedural due process guarantee afforded him that was available under the Constitution or the laws of the State of Texas. This hearing was quite extensive as evidenced by the length of the transcript on file herein, and the hearing was held before the Board of Trustees, *without* (emphasis added) objection from Petitioner or his attorney, and after Petitioner's counsel had had ample opportunity, and after having, in fact, examined the tribunal by questioning as to whether or not they had already made up their minds on the matter. (R.-Board TR. p 9) Then, upon appeal, Petitioner questions the fairness of said forum. That, within the time prescribed by the law, the Petitioner herein, after having received an adverse finding from the Board of Trustees of the La Vega Independent School District, exercised his further right by appealing to the Commissioner of Education for the State of Texas. That hearing was held under guidelines and as prescribed by law and at that hearing the Petitioner herein was afforded the additional opportunity of being confronted with witnesses, being able to present witnesses in his own behalf, and testifying in his own behalf, all of which he took advantage of. This proceeding, like the first before the Board of Trustees of the La Vega Independent School District, was transcribed and the record is before this Court for examination. The Petitioner, after receiving an adverse finding before the Commissioner of Education, then exercised his next process of administrative review and appealed the decision of the Commissioner of Education to the State Board of Education wherein, as in the first instance, his attorney was present, and the case was presented before the State Board of Education. The outcome of this hearing was adverse to Petitioner herein and he exercised his further right of judicial review by appealing to the Federal District Court, and, after an adverse finding at that stage of the proceeding, appealed to the United States Court of Appeals for the Fifth Circuit and from an adverse finding at the Court of Appeals, applies for an Application for Writ of Certiorari to this Court. These facts are pointed out to reiterate the fact that the Petitioner herein has received in all things the utmost in procedural due process safeguards. These steps have been approved by the Courts in several cases, including the case of *Skidmore v. Shamrock Independent School District*, 464 Fed. 2d 605, 1972, and also by the case of *Lowrance v. Barker*, et al, 347 Fed. sup. 588, 1972. The above facts taken in conjunction with the findings of the District Court, that:

> "Plaintiff does not now contend that he was denied procedural due process, though he points out that the Board had already voted to uphold the Superintendent's

> decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first instance subsequent to discharge. *Stapp v. Avoyelles Parish School Board*, supra."

eliminate any possible basis for finding that Petitioner was in any way denied due process.

It is uncontroverted in this case that the substantial evidence rule applies and this agreement is further substantiated by the United States Court of Appeals, Fifth Circuit, in their opinion in the case of *Stapp v. Avoyelles Parish School Board*, (1977) 545 F. 2d 527, 534, 535, wherein the Court said:

> "Ordinarily the District Court is not expected to conduct a de novo hearing. Rather, the first inquiry is to examine the record of a school board's hearing to ascertain whether the procedures followed violated federal rights. In other words, did the school board conduct a hearing for the principal adequate by the procedural due process requirements of the 14th Amendment? If so, then the record should be viewed to determine whether substantial evidence before the agencies support the action."

The Respondents herein would further site the case of *The City of San Antonio v. Texas Water Commission*, 407 S.W. 2d 762, 756 (1966) wherein the Texas Supreme Court stated:

> ". . . Under the substantial evidence rule the issue to be decided and on which evidence is to be heard is the reasonableness of the commissioner's order; this is a question of law and an appellant court cannot render its decision based upon facts found by a trial court

> because the legal test of the reasonableness of the order of the commission is whether it is reasonably supported by substantial evidence and not whether it is supported by a preponderance of the evidence. Furthermore, trial of fact issues by a Judge or Jury is avoided; it is the commissioner's fact finding that is before the trial and appellant courts . . . as was stated in *Gulf Land Company v. Atlantic Refining Company*, 134 Tex. 59, 74, 131 S.W. 2d 73, 82 (1939);" . . . the Court does not act as administrative body to determine whether or not it would have reached the same fact conclusion that the commission reached, but will consider only whether the action of the commission in its determination of the facts is reasonably supported by substantial evidence."

This writer would further cite in support of Respondents' contention the case of *Duke v. North Texas State University*, 469 F. 2d 869 (1973), wherein the Court, after having stated the facts of the case, reversed the Federal District Court which had entered a preliminary injunction ordering the school to reinstate Mrs. Duke as a teaching assistant, and pointed out in their opinion that Mrs. Duke received procedural due process even though certain members of the president's cabinet were also members of the board, and further stating the fact that there was no evidence of partiality presented. In so doing the Court quoted from the case of *Ferguson v. Thomas*, Fifth Cir., 1970, 430 F. 2d 852:

> "If no federal right has been violated in the procedures followed, then the Court should next look to the record as developed before the academic agency to determine whether there was substantial evidence before the agency to support the action taken, with due care taken to judge the constitutionality of the school's action on the basis of the facts that were before the agency, and on the logic applied by it."

The Court went on to point out that the First Amendment rights must be applied in light of the special circumstances of the environment:

> "To effectuate balance of competing interests, fact findings by academic agencies when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the Court should never lightly substitute its judgments for that of the board."

This Court went on to cite the case of *Esteban v. Central Missouri State College*, 8th Cir. (1969) 415 F. 2d 1099, 1090, wherein the Eighth Circuit Court of Appeals wrote the following:

> "Courts are not equipped by either training or experience to select individually the faculty and staff for colleges and universities, and to enjoin a university to hire or re-hire a member of its faculty goes beyond mere redress of constitutional rights of an individual. We should interfere only where there is a clear case of constitutional infringement."

To this writer it seems readily apparent from the cases cited above and from that portion of the district court's decision in the case at bar wherein the Court wrote:

> "The Court is of the opinion that there was substantial evidence to support the Board of Trustees' decision to demote Robert Polley."

that this Court should in all things affirm the judgment of the district court, the United States Court of Appeals for the Fifth Circuit, and in so doing adhere to the rules set forth by this Court in *Bishop v. Wood*, supra.

CONCLUSION

The Application for Writ of Certiorari of Petitioner, Robert O. Polley, should be denied.

Respectfully submitted,

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By _____
Tommy P. Herring
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CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of March, 1980, 3 copies of the foregoing brief for Respondents were mailed, postage prepaid, to Tony E. Duty, Attorney at Law, 2309 Austin Avenue, Waco, Texas 76701, attorney for Petitioner. I further certify that all parties required to be served have been served.

Tommy P. Herring